

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Judge William C. Bryson

TQP DEVELOPMENT

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V.

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CIVIL NO. 2:08CV471

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MERRILL LYNCH & CO.

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ATTORNEY FOR PLAINTIFFS:

James Fussell; Adam Hoffman; Alexander Giza;
Jules Kabat; Marc Fenster; Ben Wang

ATTORNEY FOR DEFENDANTS:

Michael Hawes; Bradley Bowling; Michael Smith;
Natalie Alfaro; Roger Fulghum

LAW CLERK:

COURTROOM DEPUTY:

Mel Martin

COURT REPORTER:

Shelley Holmes

PRETRIAL CONFERENCE AND MOTION HEARING

July 26, 2012 @ 8:30 a.m.

OPEN: 8:31 ADJOURN: 2:28

8:31 ct opens; case called; begin with pretrial conference and then move to discussion on the motions; first order on trial procedures that cover how we are going to proceed; a few details that were not mentioned in the order; typical practice here is that the prospective jurors are shown a video that explains the patent process; 15 min recess to make strikes; 3 strikes each side; 8 person jury; would like you to question from the lectern; resolve as many as the pending evidentiary disputes that you have, open to having a conference by telephone the week before trial; indicated that you believe case can be tried in a week; hours per trial; is 12 hrs per side sufficient;

8:47 Fenster/ 10 to 12 hrs is sufficient; does that include opening and closing
8:48 ct/ no; have designated 30 mins for opening and 1 hr for closing;
8:49 Fenster/ appreciate the hour for closing; 10 to 11 hrs would be sufficient if opening and
closing is not included; request 45 mins for opening; timing of side bars and charge the
time to the party who loses the objections
8:50 ct/ will not charge side bars to anyone unless there are excessive objections being
overruled by one side, then I may begin to charge both sides; opening statement and want
to minimize it, wary of going beyond 30 mins; in your view should I be entering an order
re: Proposed Pretrial Order;
8:54 Hawes/ 30 mins is appropriate for opening; 10 hrs each side in term of testimony;
8:54 ct/ 10 hrs each side for trial; punctual with breaks and lunch;
8:56 Fenster/ general practice if a witness is on the stand and we take a break
8:57 ct/ while a witness is under examination he is not to discuss the subject matter or
testimony;
8:58 Fenster/ would request additional time for VD to make it 30 instead of 20 mins
8:58 ct/ small venire; will here from Mr. Hawes on that;
8:59 Hawes/ 20 mins is fine for voir dire;
8:59 ct/ which would you prefer
8:59 Hawes/ the 20 mins; some motions that would confine the trial evidence in some ways;
all of that might affect the time
9:00 ct/ will go with 20 mins for voir dire; any further questions
9:00 Wang/ issues that we wanted to flag; have met and conferred on PTO; exchanged of
opening and closing materials, demonstratives and exhibits; TDA does not want to share
opening and closing materials; order re: trial procedures
9:02 ct/ my view of this;
9:04 Wang/ how this came up in a previous trial;
9:04 ct/ will reserve that one;
9:04 Wang/ second point; exchange of exhibits and demonstratives that are used during the
trial;
9:05 ct/ that is fine and I will be available;

9:05 Wang/ jury notebooks; include pictures of the witness’;
9:06 ct/ that is very helpful
9:06 Wang/ next issue, limiting the asserted claims; asked dfts to narrow their prior art references; indicated that they are unwilling to do that;
9:07 ct/ I will hear from the dfts on that
9:08 Wang/ identification of witness’ that will be called each day, 2 days before; rebuttal witness’
9:08 ct/ with respect to rebuttal witness’
9:10 Wang/ exhibit objections; we identified 165 trial exhibits and have objected to 130 of them;
9:11 ct/ will hold off until I hear from the other side;
9:12 Wang/ both sides have work to do;
9:12 ct/ that is a daunting number of rulings to do in one phone call; don’t want to do that again;
9:13 Wang/ depo plays; ask that they be played in order
9:14 ct/ this issue has come up frequently;
9:18 Smith/ exchange of opening and closing demonstratives;
9:20 ct/ what do you have in mind other than pre-admitted exhibits;
9:21 Smith/ jury notebooks
9:21 ct/ suggest that the more help you can give the jury the better;
9:23 Smith/ trial exhibits, proposed meeting yesterday at 3pm and they were unable to attend;
9:24 Hawes/ gives example;
9:24 ct/ will make myself available by telephone tomorrow and over the weekend; important that we get this resolved;
9:26 Smith/ not available this afternoon
9:26 ct/ will be available tomorrow and will make myself available each day until late next week;
9:26 Hawes/ a couple of issues; limiting claims and limiting prior art references; question of how depositions will be played; my concern;
9:30 ct/ how he testified;

9:31 Hawes/ responds;

9:34 ct/ should be possible to workout;

9:36 Hawes/ offer a compromise; ask ct to unseal last weeks sealed orders;

9:37 ct/ in another case I initially issued an order under seal and then asked the ptys if it was necessary for them to remain under seal; something that I propose to do;

9:41 Hawes/ witness that is on the will call list for TQP;

9:42 ct/ not sure I completely understand all the nuances here; hard to rule in the abstract on this;

9:45 Hawes/ to be safe we will make the designation; we can make the exception here;

9:45 ct/ responds

9:45 Hawes/ voir dire; how parties will be referred to and prefer TD Ameritrade;

9:47 ct/ propose language that you are more comfortable with; once again this deposition issue;

9:48 Wang/ in regards to Mr. Rivest;

9:51 ct/ 30(b)(6) issue

9:51 Wang/ responds;

9:55 Hawes/ will give them designations

9:56 ct/ anything else left open

9:56 Wang/ limiting of claims and prior art references

9:57 ct/ not going to force parties to reduce claims or prior art references;

9:57 Wang/ voir dire;

9:58 ct/ heard a proposal

9:58 Wang/ problematic for us

9:58 ct/ give both an opportunity to submit or omit introductory remarks; parties propose competing language and have it to me by tomorrow afternoon;

9:59 Hawes/ will submit it;

9:59 Fenster/ point about limiting the prior art and our request;

10:00 ct/ sealed orders issue

10:00 Fenster/ no issue with the unsealing of those orders; understand from the last trial and some discussion of the proper use of expert reports; last question as respect to claim

construction

10:03 ct/ the ptys have agreed to the claim construction from the other case

10:03 Fenster/ both ptys have been treating all 4 claim constructions as governing;

10:04 Hawes/ on expert reports

10:05 ct/ they are usable for impeachment

10:06 Hawes/ in regards to claim construction orders; the orders that are in play in this case are the ones in this case;

10:06 ct/ your position is that to the extent we include claim constructions in the jury notebook are only the ones entered in this case, I agree; have we covered everything that needs to be covered here

10:08 Hawes/ I have covered all the points on my list

10:08 Fenster/ 2 rulings by the court

10:08 ct/ by Judge Ward or myself in this case

10:08 Fenster/ by Judge Ward in another case;

10:10 ct/ first issue eluded to in a pending motion but don't believe the second issue has; would like simultaneous briefing on this;

10:11 Hawes/ Monday

10:11 Fenster/ agrees

10:11 ct/ Monday works for me, to be filed by 4pm; confer about the deposition issue;

10:12 recess;

10:27 ct resumes

10:28 ct/ one point I failed to address

10:29 Hawes/ responds

10:29 Fenster/ Eastern District rules design;

10:30 ct/ not in a position to know how thorough your disclosures have been;

10:31 Hawes/ can we identify the ED rule

10:32 Fenster/ responds; disclose what they intend to use

10:33 Hawes/ reply;

10:36 ct/ going to propose would like TDA to provide a more restricted list of the principle items of prior art that it will rely upon; offer as a compromise

10:38 Hawes/ we don't like one way restriction on our case

10:38 Fenster/ responds; our case is fully flushed out

10:40 Hawes/ address' the ct;

10:41 ct/ will ask TDA to provide a list of the principle prior art references; did not get an answer to my question re: the PTO;

10:42 Fenster/ don't see that it is necessary

10:42 Smith/ we do thin it is necessary that it be signed;

10:43 ct/ will enter an order

10:43 Fenster/ might have a slight change to the proposed verdict form; time frame for proposed prior art references;

10:44 ct/ end of the day Friday;

MOTION HEARING

10:44 ct/ motions by categories; 1st group summary judgment motions dkt #'s 521, 531, 519, and 520;

10:46 Fenster/ address' dkt # 521;

10:49 Bowling/ responds;

10:55 Hoffman/ address' the ct;

11:00 Bowling/ responds;

11:05 ct/ will enter orders by early next week; next one is 531 issue of divided infringement

11:06 Fenster/ responds;

11:07 Alfaro/ we do agree and it is a non-issue;

11:07 ct/ dkt # 519; pending disposition, don't know what I can do at this point on this motion other than hold it over; thinking ahead best we can do is proceed in a way that will allow us to write jury interrogatories to protect a judgment in this case; I hope we have a resolution before we have jury instruction on this case;

11:09 Hawes/ look to the law that is in place currently;

11:10 ct/ looking for a way to protect ourselves against a chance that the Federal Circuit will do that; have not worked it out but invite the ptys to give it some thought;

11:12 Hawes/ third option a continuance for a month;

11:14 ct/ concerned with the situation of the ptys; reluctant to do and would do it only if both

ptys wanted it;

11:16 Hawes/ responds;

11:17 Fenster/ re: procedurally how we move forward; does make sense to hold decision on summary judgment; it would be incredibly burdensome to continue the case; my one sentence in rebuttal;

11:19 ct/ move to dkt # 520;

11:20 Hawes/ argues 520;

11:21 ct/ let's talk about Judge Ward's claim construction;

11:21 Hawes/ responds;

11:26 ct/ how to interpret Judge Ward's claim construction;

11:27 Hawes/ pages where we identified it; pg 6 of dkt # 573;

11:29 Fenster/ responds;

11:33 ct/ if we assume you are correct, is there a factual dispute that bears on whether there is a question of providing in this case

11:36 Fenster/ responds; our position

11:38 ct/ move to dkt # 528 motion to exclude

11:39 Hoffman/ address' the ct;

11:45 Alfaro/ responds;

11:52 ct/ move on to remaining Dalbert motions dkt # 526 and 510

11:53 Giza/ argues dkt # 526;

12:01 Hawes/ responds;

12:09 ct/ move to Becker motion, # 510

12:09 Smith/ argues motion;

12:11 Hoffman/ responds;

12:18 ct/ will resume with motion in limine and dkt # 563 motion for sanctions;

12:18 Hawes/ we have discussed deposition issue;

12:19 recess;

1:16 ct resumes; will need to move quickly, starting with TQP motion # 1;

1:18 Wang/ all we are asking for

1:18 ct/ denies motion in that form; now # 2

1:18 Bowling/ responds;
1:18 ct/ no issue with direct; motion # 3 reason I should not grant this motion
1:19 Hawes/ responds;
1:20 Wang/ reply
1:21 ct/ will visit this question when it arrives at the damages stage; no general relevance to
patents that I can see;
1:22 Wang/ one related issue
1:22 Hawes/ responds
1:22 ct/ # 4, goes to question on providing issue
1:22 Hawes/ responds
1:24 ct/ motion in limine # 5;
1:24 Bowling/ that is correct
1:24 ct/ denies motion
1:24 Wang/ gave three specific examples of what they wanted to address with the inventor
1:25 Bowling/ responds;
1:26 ct/ don't think that is beyond the scope of questioning the inventor; motion # 6 is moot;
motion # 7, will deal with that in context of Olivier; motion # 8 no reason to strike, will
deal with foundation if and when it comes up;
1:27 Giza/ one quick point on that;
1:29 Hawes/ responds;
1:29 ct/ motion in limine # 9; have looked at that and my approach would be to say, not going
to exclude that particular item for purposes of possible impeachment;
1:30 Wang/ address' the ct;
1:32 Hawes/ responds;
1:32 Wang/ reply;
1:34 Hawes/ willing to submit question in camera to you but will not give my cross to them;
1:34 ct/ will allow you to submit to me information re: admissibility; initial reaction inclined
to grant request to cross on this issue; 1:35 motion in limine # 10
1:36 Hawes/ a package deal a bunch that are related;
1:36 ct/ problem with excluding this

1:36 Hawes/ cherry picking
1:36 ct/ grants, except; motion in limine # 11 same as TDA 13;
1:37 Hoffman/ yes; address' the ct; talking about settlements
1:40 Hawes/ on damages point;
1:41 ct/ what evidence do I have now before me that this is inadmissible because of that; will hold off ruling on this one;
1:43 Hoffman/ address' the ct;
1:44 Hawes/ responds;
1:45 ct/ okay will hold off on this; # 12,
1:45 Hawes/ responds re: # 12 related motion;
1:45 ct/ will deal with it in that context; # 14, don't like advisory juries;
1:47 Wang/ one issue,
1:47 Hawes/ this is about latches; one point cost of litigation
1:48 Hoffman/ address' the ct;
1:49 ct/ move to TDA's motion in limine # 1, don't understand TQP to be arguing for a priority date earlier than the filing date;
1:49 Bowling/ responds;
1:50 ct/ not going to make a blanket prohibition on how he came up with this invention; deny that; series of MIL's directed at costs, breaches of security,
1:51 Giza/ clarification on MIL's 2 and 3
1:51 ct/ didn't think those were in the case
1:51 Giza/ address' the ct;
1:51 Hawes/ they agreed to that one;
1:53 ct/ talking about # 3;
1:54 Giza/ responds;
1:54 Hawes/ last paragraph of our MIL's;
1:55 ct/ will look at this question, I am inclined to hold you to the terms of your agreement;
1:55 Fenster/ may have been our mistake
1:57 Hawes/ don't know how we could have been more clear in our wording
1:57 ct/ not going to rule on this at the moment;

1:58 Fenster/ responds

1:58 ct/ will look at it; talking about the group of MIL's dealing with security budget, online banking, data breach;

2:00 Kabat/ motions # 4, 7, and 8

2:00 ct/ quite general in nature;

2:00 Kabat/ address' the ct;

2:06 Bowling/ responds

2:08 ct/ grants these motions, 4, 7, 8, and 11; brings us to MIL # 10

2:09 Hawes/ contingent with the Dalbert motion

2:09 Hoffman/ I disagree

2:09 ct/ I follow you; MIL # 13, parallels TQP's 11, will put this on the shelf as well; MIL # 15 and it matches there # 4, thinking about that as well; move to sanctions issue and issue of portions of SJ order should be effectively translated into instruction for the jury

2:11 Hawes/ point out two things;

2:13 ct/ focus your attention

2:17 Hawes/ will look at all that

2:17 Fenster/ responds;

2:18 ct/ arrangement was improper

2:22 Fenster/ instruction should not be taken out of context

2:23 Hawes/ responds;

2:23 ct/anything else

2:23 Hawes/ one more thing

2:23 Fenster/ opening slides

2:23 ct/ bring me back to that point; open question that I did not tie up

2:24 Smith/ it was left open

2:24 ct/ not going to get into closing, let's deal with opening for now

2:24 Smith/ consider it work product; don't want to turn over our view of the case; one other point;

2:25 ct/ how many demonstratives are you going to use

2:26 Hawes/ responds;

2:26 ct/ suppose we have plfs disclose to you and then you get a period of time and then you disclose to the plfs

2:27 Fenster/ responds

2:28 Hawes/ responds, if they provide them end of business I will have ours to them beginning of business the following day;

2:28 adjourned